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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 JULIO MENDOZA-MEJIA,

11 Defendant.

NO: 2:16-CR-159-RMP

ORDER DENYING MOTION TO
DISMISS INDICTMENT

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13 A pretrial hearing was held in this matter on January 26, 2017. Defendant,
14 who was present and in custody, was represented by Assistant Federal Defender
15 Daniel J. Rubin. Assistant United States Attorney Matthew F. Duggan was present
16 on behalf of the Government. Defendant presented argument regarding his Motion
17 to Dismiss Indictment, ECF No. 20. After the hearing, the Court permitted
18 Defendant to have the benefit of additional briefing. The Court has reviewed the
19 briefing, the record, heard oral argument, and is fully informed.
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1 Defendant is charged with being an Alien in the United States After
2 Deportation in violation of 18 U.S.C. § 1326, but now challenges the validity of his
3 2012 deportation. *See* ECF Nos. 1 and 20.

4 BACKGROUND

5 On November 28, 2012, Defendant was provided with a Notice to Appear in
6 front of an Immigration Judge (IJ) to answer to the charge that he was then “an
7 alien present in the U.S. who has not been admitted or paroled.” ECF No. 20 at 15.
8 Defendant appeared before the IJ on December 11, 2012, as part of group removal
9 proceedings and communicated with the assistance of a Spanish interpreter. *Id.* at
10 2. As confirmed by the audio recording of the hearing, Defendant was advised of
11 his right to hire an attorney, he was provided with a list of attorneys who were
12 willing to assist at little to no cost, and he was asked if he would like time to secure
13 legal representation. Defendant waived his right to an attorney and confirmed that
14 he would represent himself.

15 Defendant answered a series of questions about his circumstances, admitting
16 that he was a citizen of Mexico, but stating that he had two young children who are
17 U.S. citizens. The prosecutor alleged that Defendant had been convicted for
18 possession of cocaine, a conviction that Defendant now alleges does not exist, and
19 for a DUI. However, when asked if he had been convicted of possessing cocaine,
20 Defendant stated that he had.

1 The IJ found Defendant ineligible for cancellation of removal and denied
2 him voluntary departure as a matter of discretion. Subsequently, she ordered that
3 Defendant be deported. The IJ asked Defendant if he would like to appeal her
4 ruling to a higher court, and he unambiguously stated, “No.” Defendant now
5 challenges that deportation order.

6 ANALYSIS

7 A defendant charged with violating 8 U.S.C. § 1326 may not challenge the
8 validity of the underlying deportation order unless he demonstrates that “(1) the
9 alien exhausted any administrative remedies that may have been available to seek
10 relief against the order; (2) the deportation proceedings at which the order was
11 issued improperly deprived the alien of the opportunity for judicial review; and
12 (3) the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d).

13 Defendant did not appeal his 2012 removal, and, as discussed in further
14 detail below, there is no basis to invalidate Defendant’s explicit waiver of his right
15 to do so. Therefore, as Defendant fails to clear the first of three statutory hurdles,
16 the Court need not proceed further. However, as Defendant raises the issue of the
17 validity of his appeal waiver, the Court addresses his other due process challenges.

18 In order to succeed in his challenge to the underlying removal proceedings,
19 Defendant must demonstrate that “(1) his due process rights were violated by
20 defects in his underlying deportation proceeding, and (2) he suffered prejudice as a
21 result of the defects.” *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir.

2000) (internal quotations and citation omitted). In order to demonstrate prejudice, Defendant need not show that he would have obtained relief; “he must only show that he had a ‘plausible’ ground for relief from deportation.” *Id.*

Defendant raises three grounds to support a finding that his deportation was “fundamentally unfair”:

First, the IJ never obtained a knowing, intelligent, and voluntary waiver of the right to counsel. Second, the IJ failed to advise Mr. Mendoza-Mejia of his apparent eligibility for relief from removal. And, third, even though the IJ advised Mr. Mendoza-Mejia of his right to appeal she failed to determine whether his purported waiver was constitutionally sound.

ECF No. 20 at 8.

Waiver of Counsel

Defendant argues that his waiver of counsel failed to suffice pursuant to the Fifth Amendment to the United States Constitution. ECF No. 20 at 5-6. “Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings.” *United States v. Ramos*, 623 F.3d 672, 682 (9th Cir. 2010) (quoting *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).

“Although IJs may not be required to undertake Herculean efforts to afford the right to counsel, at a minimum they must [(1)] inquire whether the petitioner wishes counsel, [(2)] determine a reasonable period for obtaining counsel, and [(3)] assess whether any waiver of counsel is knowing and voluntary.”

Id. (internal citations and quotations omitted).

1 The audio recording of the deportation proceeding demonstrates that
2 Defendant was advised of his right to counsel, was provided with a list of attorneys
3 who were willing to provide services at little to no charge, was asked if he wanted
4 an attorney, and asked if he wanted additional time to find an attorney. Defendant
5 unequivocally responded that he would represent himself, and the IJ found that
6 Defendant knowingly waived his right to have an attorney.

7 Despite Defendant's explicit waiver of counsel, defense counsel relies on
8 Defendant's comment later on in the proceedings when he asked for a "bond" as
9 evidence that he didn't understand the proceedings. ECF No. 20 at 9. Defense
10 counsel argues that "[a]t this point, the IJ was clearly on notice that Mr. Mendoza-
11 Mejia did not understand his legal rights and should have understood Mr.
12 Mendoza-Mejia's waiver of counsel was not knowing and voluntary and should
13 have discussed with Mr. Mendoza-Mejia again the option of him hiring a lawyer."
14 *Id.* The IJ responded to Defendant that they were beyond that point, and reminded
15 him that she had previously asked him if he had questions and whether Defendant
16 wanted to represent himself.

17 The Court finds that Defendant made an unequivocal waiver of counsel,
18 despite his inquiry regarding bond. There is no obligation for an IJ to ask the same
19 questions to double-check if a defendant wants counsel due to a request like the
20 one Defendant made at his hearing. Defendant's request for a bond did nothing to
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1 vitiate his statement that he would represent himself during the removal
2 proceedings.

3 **Alleged Failure to Advise Defendant of “Apparent Eligibility” for Relief**

4 Defendant argues that he should have been advised of different avenues of
5 relief from removal. ECF No. 20 at 10. Defendant states that he was eligible for
6 two separate forms of relief: cancellation of removal and voluntary departure, but
7 was denied both due to the IJ’s erroneous reliance on a conviction for possession
8 of cocaine that did not exist. *Id.* at 10-11. However, the IJ is recorded as stating
9 the requirements for both types of relief that Defendant now asserts he was
10 improperly denied.

11 In order to be eligible for cancellation of removal, Defendant must

12 (A) ha[ve] been physically present in the United States for a continuous
13 period of not less than 10 years immediately preceding the date of such
application;

14 (B) ha[ve] been a person of good moral character during such period;

15 (C) ha[ve] not been convicted of an offense under section 1182(a)(2),
1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

16 (D) establish[] that removal would result in exceptional and extremely
unusual hardship to the alien’s spouse, parent, or child, who is a citizen
of the United States or an alien lawfully admitted for permanent
residence.

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18 8 U.S.C. § 1229b(b). A review of the evidence submitted by Defendant
19 demonstrates that he was returned to Mexico in 2008, which the Court found
20 relevant to the first prerequisite to eligibility for cancellation of removal.

21 Defendant argues that he was turned around at the border, but was not
subject to a more formal administrative voluntary departure process, so the Court

1 should find that his continuous physical presence should not have been interrupted
2 by his brief return to Mexico in 2008. *See* ECF No. 30. In his supplemental
3 motion, defense counsel correctly cites Ninth Circuit law for the proposition that
4 “being turned away at the border by immigration officials does not have the same
5 effect as an administrative voluntary departure and does not itself interrupt the
6 accrual of an alien’s continuous physical presence.” *Tapia v. Gonzales*, 430 F.3d
7 997, 998 (9th Cir. 2005). Defendant also submitted a declaration stating that he
8 was only subjected to a turnaround at the border in 2008. ECF No. 30 at 6.

9 The Government responded with additional briefing to argue that an
10 administrative voluntary departure under threat of coerced deportation breaks an
11 alien’s continuous presence for purposes of the ten-year physical presence
12 requirement. *See* ECF No. 31.

13 Although both parties accurately state relevant law, it is unclear whether
14 Defendant in this matter was subject to an administrative voluntary departure
15 process or was simply turned around at the border. Even accepting Defendant’s
16 declaration as true, Defendant still fails to prove that he could meet all of the
17 remaining requirements for cancellation of removal.

18 Defendant had the opportunity and did tell the IJ that he has two children
19 who are citizens of the United States, but he failed to demonstrate that his removal
20 to Mexico would cause “exceptional and extremely unusual hardship to the alien’s
21 spouse, parent, or child, who is a citizen of the United States or an alien lawfully

1 admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1)(D). Defendant argues
2 that simply because he has two children, “one would reasonably infer that he is one
3 of two providers (both financial and emotional) for those US citizen children.”
4 ECF No. 25 at 2. However, the documents provided by Defendant reflect that he
5 was unemployed in 2012 and that his two children lived with their mother. *See*
6 ECF No. 20 at 34-35. Defendant now declares that he has had various jobs during
7 his time in the United States, and that he was the main financial provider for his
8 children in 2012. *Id.* at 41. Even if the Court accepts these unsupported
9 statements as true, Defendant fails to demonstrate even the ordinary hardships
10 imposed by routine deportations, much less “exceptional and extremely unusual
11 hardship to the alien’s spouse, parent, or child.” *See United States v. Arce-*
12 *Hernandez*, 163 F.3d 559, 564 (9th Cir. 1998), *as amended on denial of reh’g*
13 (Mar. 11, 1999).

14 Therefore, although the IJ relied on a non-existent conviction to deny
15 cancellation of removal, Defendant was not prejudiced by that error because he
16 would not have been qualified for cancellation in any case. The Court finds that is
17 not plausible that Defendant would have been found eligible for cancellation of
18 removal based on the evidence presented to the IJ and to this Court.

19 Defendant also argues that he was eligible for voluntary departure.
20 Pursuant to 8 U.S.C. § 1229c(c), “[t]he Attorney General shall not permit an alien
21 to depart voluntarily under this section if the alien was previously permitted to so

1 depart after having been found inadmissible under section 1182(a)(6)(A)¹ of this
2 title.” Although it appears Defendant may have been eligible for voluntary
3 departure (if the Court accepts Defendant’s contention that he has not previously
4 benefitted from that relief in 2008), the IJ explicitly stated that she denied
5 Defendant voluntary departure as a matter of discretion. In doing so, the IJ relied
6 on more than just the non-existent conviction for possession of cocaine; the IJ also
7 referenced Defendant’s recent immigration history and his conviction for driving
8 under the influence.

9 The record is incomplete as to whether the IJ would have exercised her
10 discretion in Defendant’s favor if she had considered only his DUI conviction and
11 recent immigration history. In any case, the Court need not make that
12 determination, because, as set out in greater detail below, Defendant waived his
13 right to appeal the IJ’s order.

14 **Waiver of Right to Appeal**

15 [A]n alien is barred from collaterally attacking an underlying
16 deportation order “if he validly waived the right to appeal that order”
17 during the deportation proceedings. [*U.S. v.*] *Arrieta*, 224 F.3d at 1079,
18 citing *United States v. Estrada-Torres*, 179 F.3d 776, 780–81 (9th Cir.
19 1999). “In order for the waiver to be valid, however, it must be both
20 ‘considered and intelligent.’” *Arrieta*, 224 F.3d at 1079, citing *United*
States v. Mendoza-Lopez, 481 U.S. 828, 840 [] (1987). Such a waiver
is not “considered and intelligent” when “the record contains an
inference that the petitioner is eligible for relief from deportation,” but
the Immigration Judge fails to “advise the alien of this possibility and

21 ¹ This statute references “Aliens present without admission or parole.”

1 give him the opportunity to develop the issue.” *Arrieta*, 224 F.3d at
2 1079, quoting *Moran–Enriquez v. INS*, 884 F.2d 420, 422–23 (9th Cir.
1989).

3 *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001).

4 Defendant was advised about the prerequisites to the relief he argues he was
5 entitled to receive, was asked if he was married, when he arrived in the United
6 States, and was asked about his children. Accordingly, he was advised of various
7 avenues of relief and was given an opportunity to provide relevant information
8 before the IJ made her decision.

9 At the end of the 2012 deportation proceeding, the IJ asked Defendant if he
10 would like to appeal her ruling to a higher court, and he unequivocally stated,
11 “No.” Defendant again relies upon his vague request for a “bond” as evidence that
12 he didn’t understand the proceedings, and argues that

13 [w]ithin a minute of his request the IJ had told him that ship had sailed,
14 rejected voluntary departure and asked if he wanted to appeal to which
15 he responded no [sic]. All of that happening in the course of one minute
clearly indicates that Mr. Mendoza-Mejia did not understand his appeal
rights.

16 ECF No. 20 at 13. The fact that Defendant responded quickly that he did not want
17 to appeal the ruling, even if he made an inapposite request immediately before
18 doing so, does not vitiate the validity of his waiver.

19 Based on the foregoing, the Court finds that Defendant is foreclosed from
20 challenging the 2012 deportation order that serves as a basis for his current charge.

1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to
2 Dismiss Indictment, **ECF No. 20**, is **DENIED**.

3 The District Court Clerk is directed to enter this Order and provide copies to
4 counsel.

5 **DATED** February 6, 2017.

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7 *s/ Rosanna Malouf Peterson*
8 ROSANNA MALOUF PETERSON
9 United States District Judge
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